No. 18-966

In the
Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

NEW YORK, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA) AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION (ICMA) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The International City/County Management Association (ICMA) is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

Here, IMLA and ICMA address the threshold issue of standing, contend that the government Respondents have standing, and urge the Court to reach the merits of the administrative and constitutional questions presented.

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[1] This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

The government Respondents have met their burden of establishing standing, satisfying all three elements—injury in fact, traceable to federal government conduct, and redressable by judicial action. Petitioners and their amici do not even contest redressability, and clearly the judiciary is able to rectify the addition of the citizenship question to the 2020 Census.

As to an injury in fact, in addition to the obvious harms some states will suffer regarding Congressional representation and loss of federal funding, local governments will also be injured. Based on the court below's fact findings that the citizenship question will result in inaccurate census data, local governments will be harmed in many ways, including in their ability to provide services in the areas of health, safety, education, and public transportation. Local governments need accurate data. Without it, for example, they are unable to plan an appropriate number of hospital beds or when additional healthcare facilities are warranted. Law enforcement agencies and emergency response departments depend on accurate date to plan their staffing.

In the field of education, accurate data informs decisions on when new schools are needed, what amount of staff is appropriate, and how best to provide English-language services. Local governments also use census data to help decide when new roads, additional public transportation, and infrastructure improvements will be needed.

On the traceability element, Petitioners' argument that third parties would break the casual chain between the citizenship question and the resulting

harm is meritless. Inaccurate census data would be fairly traceable to Petitioners. Acts of third parties do not defeat standing when they are easily predictable, even if misguided or illegal, when challenged government conduct is a substantial motivating factor behind the third parties' acts. Here, the entirely predictable acts of "third parties"—actual recipients of census forms themselves—would be fairly traceable to what Petitioners put on the census forms. Considerable evidence and fact findings by the courts below show that harm to local governments is not speculative.

ARGUMENT

The government Respondents ("Respondents") satisfy the three elements necessary to establish standing under Article III: (1) an injury in fact, (2) that is fairly traceable to the defendant's challenged conduct, and (3) that is likely redressed by a favorable judicial decision. *See, e.g., Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016). Respondents need establish by a preponderance of the evidence that all three requirements are met. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Respondents have satisfied all three elements.

That Respondents have met their burden on the third element, redressability by a favorable judicial decision, is not in controversy. The federal judiciary may enjoin the United States Department of Commerce from including the citizenship question in the census. *See State of California v. Ross*, No. 18-cv-01865-RS, 2019 WL 1052434, at *31 (N.D. Cal. Mar. 6, 2019); *see also* Pet. App. 239a. The standing inquiry is, therefore, appropriately limited to the first two elements.

Respondents have also established that they satisfy the injury in fact and traceability elements. Regarding injury in fact, governments will suffer, among others, the obvious injuries of decreased federal funding and representation in the United States House of Representatives. *See State of California*, 2019 WL 1052434 at *27-30; *see also* Pet. App. 200a-226a. As addressed *infra*, governments will suffer additional injuries if the citizenship question is included. In terms of traceability, Respondents have also shown that those injuries would not occur absent the Department of Commerce including the citizenship question. *See State of California*, 2019 WL 1052434 at *30-31; *see also* Pet. App. 226a-239a. Accordingly, these injuries to state and local governments are traceable to the actions of the Department of Commerce. In sum, Respondents have met their burden in establishing standing to pursue the relief sought.

I. INACCURATE CENSUS DATA RESULTING FROM THE CITIZENSHIP QUESTION WOULD HARM LOCAL GOVERNMENTS IN NUMEROUS WAYS

Local governments would experience significant harm stemming from receiving inaccurate census data due to the inclusion of the citizenship question. The injury in fact requirement is satisfied when the complained of injury is imminent due to the government's challenged actions. *See Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). This Court has held that the "inability to obtain information" satisfies the injury in fact element of the standing inquiry. *See FEC v. Atkins*, 524 U.S. 11, 21 (1998). Implicit in that determination, as noted in the opinion from the court below, is "that the inability to obtain accurate

information" is a cognizable injury under Article III. Pet. App. 210a. This conclusion is so uncontroversial that Petitioners (at 17-21) chose not to address the injury in fact element of standing in their merits brief.

States will undeniably suffer harm from inaccurate census data due to underreporting in the form of losing both representation in the United States House of Representatives and the loss of federal funds. *See* Pet. App. 201a-205a; *see also State of California*, 2019 WL 1052434 at *27-29. Additionally, not only will states suffer an injury traceable to the inclusion of the citizenship question, local governments will also be injured as a result of the citizenship question.

It is imperative for local governments to have a correct understanding of the total number of individuals living in the communities those governments serve. Local governments routinely and necessarily rely on accurate census data to plan for the needs of their communities. *See, e.g.*, Council of Econ. Advisers, *The Uses of Census Data: An Analytical Review* (2000) (describing the ways in which state and local governments use census data). Without an accurate counting of the number of individuals served, local governments will not be able to appropriately understand and address the needs of their populations. This is an injury to the local governments themselves, and it is manifested in multiple ways, of which a few are addressed below.

First, the health and safety of the total population, including those who answer the census fully, will be harmed because local governments will not know a reliable number of people they serve. Local institutions such as hospitals, law enforcement

agencies, and emergency response departments rely on census data to plan for how best to serve and protect their population. *See id.* For instance, hospitals rely on consultants to look at the census data and determine if there are an adequate number of hospital beds or if they need to build another hospital in the area. *See generally Strategy and M&A: Health Care Providers*, Deloitte, https://www2.deloitte.com/us/en/pages/life-sciences-and-health-care/solutions/strategy-and-mergers-and-acquisitions-health-care-providers-services.html (last visited Mar. 25, 2019).

Similarly, the court below noted that New York City's Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities. Pet. App. 186a.

Law and enforcement and emergency response officers similarly rely on census data to determine the number of officials they should employ in order to best support their populations. *See* Council of Econ. Advisers, *supra*.

Additionally, education at the local level will surely be affected by inaccurate census data. Local governments will struggle to understand how to fund their school districts at the levels necessary to ensure that their educational infrastructures are sufficient. *See id.* They will also have difficulty in determining whether the students are supported by the appropriate number of staff. *See id.* For a specific example, based on the evidence at trial, the court below found that New York City's Department of Education relies on demographic data derived from the census to redraw school zone boundary lines and

that the Mayor's Office of Immigrant Affairs distributes English-language services based on its understanding of where the highest concentration of limited-English-proficient populations live. Pet. App. 186a.

Furthermore, local governments will face similar problems in evaluating the continued viability of their current infrastructures, such as potential road expansions and increased public transportation. *See* Council of Econ. Advisers, *supra*. Without an accurate understanding of their populations, local governments will be crippled in planning and implementing their most essential functions. *See also* Pet. App. 186a-187a (noting that New York City expects a 46% increase in its 65-and-over population by 2040 and needs to design appropriate infrastructure and physical accommodations). It is all but certain that local governments, in addition to the States, would suffer numerous significant injuries from inclusion of the citizenship question in the 2020 Census.

II. HARM TO LOCAL GOVERNMENTS WOULD BE TRACEABLE TO THE CITIZENSHIP QUESTION

Local governments would suffer harm as a result of the citizenship question, and this harm would be traceable to the addition of the question. The second element of standing requires "that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant." *Bennett v. Spear*, 520 U.S. 154, 166 (1997). While injury may "not [be] the result of independent action of some third party not before the court," *id.*, traceability is

not defeated when the causal chain increases in length or when third parties comprise a link in the chain. *See Defs. of Wildlife*, 504 U.S. at 562; *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) ("Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain.") (citing *Bennett*, 520 U.S. at 168-69).

Though standing is not defeated when the decisions of third parties are involved, in such situations plaintiffs bear the burden "to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defs. of Wildlife*, 504 U.S. at 562. Making such a showing, however, is straightforward when the response of the third parties is easy to predict, as it is in this case. *See* Pet. App. 233a ("[W]here record evidence, statistical analysis, or just plain common sense support a finding . . . that third parties will respond to the challenged government conduct in a predictable way, 'traceability' is *not* defeated."). Here, because the injury to local governments would be "fairly traceable" to the citizenship question, the second element of standing is met.

A. Traceability is not precluded by acts of third parties, even if those acts are illegal or seemingly irrational

Actions of third parties, even illegal or seemingly irrational acts, can still be traceable to the "challenged action" of the government. The presence of third parties in the causal chain will not defeat

standing. *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986). Otherwise, there would not be standing to bring, for example, a suit for libel or for inducement of breach of contract. *Id.*

In *Block v. Meese*, the D.C. Circuit held that an argument that the public was acting irrationally in response to government conduct "is irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality." *Id.* As applied to the citizenship question in the census, even if an individual's decision not to answer the question is misguided—given that the Census Bureau is not supposed to share this information, *see* 13 U.S.C. § 9—actions made in response to misguided or irrational fear do not break the chain of causation. The harm to local governments would still be traceable to the federal government's conduct.

Additionally, even if the acts of third parties were illegal, the chain of causation would still not be broken. Standing is a "threshold inquiry," and a determination of whether the court has standing to hear the case "in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Instead, the standing inquiry focuses on determining whether a "claim qualifie[s] as an exercise in the 'judicial power' as defined by Article III." Pet. App. 235a.

Standing is not defeated by "injury produced by determinative or coercive effect upon the action of someone else." *Bennett*, 520 U.S. at 169. To plausibly allege that injury did not result from an independent action of a third party, as *Bennett* requires, a plaintiff

need only "offer facts showing that the government's unlawful conduct 'is at least a substantial factor motivating the third parties' action.'" *Mendia*, 768 F.3d at 1013 (quoting *Tozzi v. U.S. Dep't of Health and Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)).

While the Department of Commerce argues (at 18) that people are coerced into *answering* the census because failing to do so would be illegal, here coercion would work the other way. Some individuals, not knowing exactly how their data will be used, will actually feel coerced to either answer untruthfully or not answer the question at all, because answering the question would force them to reveal unlawful activity. Some individuals would decide not to answer the question either out of fear or reluctance to admit to the federal government that they are violating immigration laws. Regardless of how individuals feel coerced, they will, as the Department of Commerce has admitted, be coerced.

In short, when government conduct foreseeably gives third parties the choice between a rock and a hard place, their predictable choice of one over the other does not prevent the resulting harm from being traceable to that government conduct. Therefore, even though the complained of injury would occur as the result of the coercive effect of the citizenship question, the traceability element is not defeated.

B. Traceability is different from proximate cause and requires a lower showing

In proving the second element of standing, Respondents do not need to establish that the challenged conduct was the proximate cause of the injury. Instead, "the injury must be *fairly traceable* to the challenged action of the defendant." *Bennett*, 520

U.S. at 167 (emphasis added); *see also Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct.").

The Department of Commerce (at 17) appears to argue that if the injuries are "the result of the independent action of some third party not before the court," *Bennett*, 520 U.S. at 167, then those actions are necessarily "insufficient to support standing." However, whether standing exists is based on the "fairly traceable" standard, and "the 'fairly traceable' standard is lower than that of proximate cause." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013). Instead of showing the injury suffered was the proximate cause of the challenged conduct, "the plaintiff 'must demonstrate a causal nexus between the defendant's conduct and the injury.'" *Id.* (quoting *Heldman v. Sobol*, 962 F.2d 148, 156 (2d Cir. 1992)); *see also* Pet. App. 132a; *State of California*, 2019 WL 1052434 at *30. Here, it cannot be gainsaid that Respondents have demonstrated a causal nexus exists between Petitioners' conduct—the addition of the census question—and the injuries Respondents will suffer if the 2020 Census includes a citizenship question.

C. Concluding that some people will not answer the census if the citizenship question is included requires little, if any, speculation

There is no valid argument that it is mere speculation that some people will not answer the

census accurately or at all if the citizenship question is included.

After considering extensive evidence, the District Court for the Southern District of New York and the District Court for the Northern District of California both found that adding this question will cause individuals to not answer the census. *See State of California*, 2019 WL 1052434 at *4 ("Undisputed evidence in this case shows that adding a citizenship question to the 2020 Census will cause a differential decline in self-response rates for noncitizen and Hispanic households."); Pet. App. 140a ("Plaintiffs have proved that the addition of a citizenship question will cause precisely [a net differential undercount] with respect to noncitizen and Hispanic households. Moreover, with respect to the net differential decline in self-response rates among noncitizen households, Plaintiffs have also proved the likely *amount* of the decline.").

Such findings of fact are based upon memos from the Census Bureau itself. Pet. App. 141a-144a; *State of California*, 2019 WL 1052434 at *4-9. The findings are also based on expert testimony. Pet. App. 144a-147a; *State of California*, 2019 WL 1052434 at *8-10. This Court should accept these findings of fact because they are not "clearly erroneous." *See* Fed. R. Civ. Pro. 52.

CONCLUSION

The Court should conclude that Respondents have standing to reach the substantive legal questions presented in this case.

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